STATE OF MICHIGAN
SUPREME COURT

Court of Appeals No. 244507

Lower Court No. 2001-000103-CH
Michael E. Dodge, Judge

HOERSTMAN GENERAL CONTRACTING, INC.,	)	SUPREME COURT NO. 126958
Plaintiff/Appellee,	)	
v.	)	
JUANITA REMS HAHN and C. RONALD HAHN,	)	
Defendants/Appellants.	)	

REPLY BRIEF ON APPEAL-APPELLANTS

ORAL ARGUMENT REQUESTED

Timothy W. Woods (P22861)
Attorney for Defendants/Appellants
Jones Obenchain, LLP
600 KeyBank Building
202 South Michigan Street
Post Office Box 4577
South Bend, Indiana 46634-4577
Phone: (574) 233-1194

TABLE OF CONTENTS

INDEX OF AUTHORITIES

ARGUMENT

In its Answer Brief on Appeal, the plaintiff-appellee, Hoerstman General Contracting, Inc. (hereinafter the "Corporation", "Hoerstman" or "Plaintiff"), asserts that the parties did not reach an accord and satisfaction in this case because the defendants-appellants, Juanita Rems Hahn and C. Ronald Hahn (hereinafter "Hahn") did not dispute the amount claimed was owed by Hoerstman in good faith; Hoerstman was not fully informed of the conditions which accompanied the Hahns' "final payment" check; and the Hahns paid Hoerstman an amount they conceded was due (Hoerstman Brief pp. iii-iv).

Hoerstman's arguments are without merit; they fail to account for all the undisputed facts in this case and/or fail to fully appreciate the holdings of this Court and the Court of Appeals which deal with the accord and satisfaction doctrine. When all the undisputed material facts are considered in light of a full and fair reading of the controlling precedent, it is clear that Hahn established their accord and satisfaction defense as a matter of law.

A. Hahn In Good Faith Disputed The Amount Hoerstman Claimed Was Due.

The parties seem to agree on the elements of the accord and satisfaction defense.[1] (Hahn Brief on Appeal p. 12; Hoerstman's Brief on Appeal pp. 8-9). Hoerstman claims that Hahn did not dispute the amount claimed due by it in good faith which is the first element of the accord and satisfaction defense (Hoerstman Brief pp. 10-12). In support

---

[1] Hoerstman is not clear on what it means when arguing that there was not a "meeting of the minds" as required by the accord and satisfaction defense (Hoerstman Brief pp. 15, 17, 22-23, 25). This issue is treated *infra* at pp. 6-7.

of this argument, Hoerstman ignores undisputed evidence and relies on heated statements made by Mr. Hahn which in light of subsequent developments are irrelevant to this issue. Hoerstman speculates that during a meeting on December 17, 1999, Mr. Hahn refused to pay the amount claimed by it because he was not listed on the deed to the property (Hoerstman Brief p. 11) and contrary to the facts, argues that Mrs. Hahn disputed the amount owed because she was ignorant of the changes requested by Mr. Hahn (*Id.* p. 12).

It should be kept in mind that Mrs. Hahn signed Hoerstman's fixed fee contract (Plaintiff's Exhibit 13, A, 57a at p. 71a) and thus she was obligated to pay the balance owed on the contract as was Mr. Hahn.

Mr. and Mrs. Hahn and Hoerstman met at Hoerstman's office on December 17, 1999. At the meeting, Mrs. Hahn expected to receive an invoice detailing the charges for the extra work Hoerstman had done and what he was charging for it. She expected to receive the invoice because she had asked for the invoice in November, 1999, and it was not given to her at that time (Tr. Vol. II, p. 133; A, 157a). Instead of the accounting, Mr. Hoerstman gave Mrs. Hahn a cost sheet for the job (Defendants' Exhibit 41; A, 75a). The cost sheet does not show charges incurred due to extras: the cost sheet lists all costs associated with the job (Tr., Vol. II, p. 54; A, 137a). Hoerstman also gave Mrs. Hahn a list of changes ordered by the Hahns (Defendants' Exhibit 40; A, 74a) but there were no costs assigned to the changes (Tr., Vol. II, pp. 134-135; A, 158a-159a). These documents did not mean anything to the Hahns because they did not show how much the changes cost (Tr., Vol. II, p. 137; A, 160a). The Corporation acknowledged that without dollars being assigned to the list of extras, it was not possible to tell how much they cost (Tr.,

Vol. II, p. 53; A, 136a).[2] Thus, before Mr. Hahn told Mr. Hoerstman he would not pay another dime until he was listed on the deed to the property (Hoerstman Brief p. 11), the Hahns had requested an accounting from Hoerstman. Moreover, after the December 17, 1999, meeting, Mr. Hahn in fact made a substantial payment to Hoerstman of $20,000.00 on December 31, 1999.[3] Mr. Hahn's heated statement about not paying is irrelevant as he made additional payments subsequent to his statement that he would not do so.

Moreover, Hoerstman's claim that Mrs. Hahn disputed the amount owed because she was ignorant of the changes to the contract is baseless (Hoerstman Brief p. 12). Mrs. Hahn was present when Mr. Hahn asked Hoerstman to remove the concrete and put in a Pergo floor (Tr. Vol. II, pp. 116-119; SA 189a-192a). Mr. Hahn spoke to Mr. Hoerstman when additions were requested but Mrs. Hahn was normally present when that occurred (Tr. Vol. III, p. 50; SA 194a); she and Mr. Hahn moved into the home on September 1, 1999, while construction was being done including additional sidewalks (Tr. Vol. III, p. 26; A, 107a; Tr. Vol. III, pp. 61-62; SA 197a-198a); Mr. and Mrs. Hahn discussed the extras (Tr. Vol. II, p. 116; SA 189a); and Mr. Hoerstman sent a letter to Mrs. Hahn in February, 2000, listing all the extras and costs assigned to them (Tr. Vol. II, pp. 64-65; A, 140a-141a; Exhibit 44; A, 77a). Mrs. Hahn responded to Mr. Hoerstman's February letter with her accounting and detailed letter explaining why she disputed the

---

[2] Hoerstman's bookkeeper was unable to determine which expenses were included in the fixed fee contract and which expenses were for extras. (Tr. Vol. I, pp. 48, 75, 79, 92-100; SA 175a-186a).

[3] Mr. Hahn testified that he paid Hoerstman from his funds $30,000.00 in June, 1999, $20,000.00 on December 31, 1999, and two other payments: one to the drywall contractor and the extra charge for the electric work. Mrs. Hahn paid the balance of the costs (Tr. Vol. III, pp. 58-59, 62; SA 195a-196a, 198a).

amount Mr. Hoerstman was demanding to settle the claim in full (Defendants' Exhibit 45; A, 80a).

The evidence of a good faith dispute as to the amount owed Hoerstman is largely undisputed and overwhelming. Hahn had a good faith dispute as to the balance owed Hoerstman.

B. Hoerstman Was Fully Informed Of Hahns' Conditional Tender of Payment.

Hahns' letter of March 15, 2000, which included the final payment check contained clear and explicit conditions which, when considered in light of all the undisputed material facts including Hoerstman's testimony that he, as a lay person, thought he would jeopardize his right to additional payments if he accepted the tender, satisfy the second and third elements of the accord and satisfaction defense.

The parties were discussing how much Hahn owed Hoerstman from at least November, 1999. They talked about it on December 17, 1999; Hoerstman sent a letter to Mrs. Hahn in February, 2000, setting forth his claim and requesting $16,910.78 which would have paid the account in full and for which he would have given Hahn a final lien waiver (Tr. Vol. II, pp. 66-67; A, 142a-143a). Mrs. Hahn responded to Hoerstman's request for additional money with her letter to him of March 15, 2000, that included a detailed accounting which showed that Hoerstman was owed a balance of $5,144.79. In her letter, Mrs. Hahn stated: "If we send you a check for the $5144.79 we will consider this account closed and will not expect discussion of the other * items. We will then expect the lein (sic) waiver to be sent. If this is not acceptable, we will have to resort to arbitration per attorney." (Defendants' Ex. 45; A, 80a). The check was enclosed with the

letter and had the words, "final payment" written on it (Defendants' Exhibits 45, 46; A, 80a, 90a; Tr. Vol. II, pp. 67-69; A, 143a-145a).

At trial, Mr. Hoerstman testified in part regarding what Hahns' letter and "final payment" check meant as follows:

> Q. The letter that was sent to you as Exhibit 45 indicates that this check of five thousand one hundred and forty-five dollars and seventy-nine cents is considered by the Hahns to be final payment, right?
> A. That's what the letter says.
> Q. And because it says that you were concerned about the effect, what effect cashing this Exhibit 46 might have on your ability to seek additional monies from the Hahns, right?
> A. Yes.
> Q. That's why you went to Mr. Campbell, right?
> A. Correct.
> Q. Before you deposited the check into your company's account you say Mr. Campbell drew these lines through the words final payment on the check?
> A. Correct.
> Q. Did you discuss Exhibit 45 or Exhibit 46 with the Hahns before you went to Mr. Campbell?
> A. No.

(Tr., Vol. II, pp. 70-72; A, 146a-148a).

Hoerstman understood the conditions attached to Hahns' tender because: (1) he admitted he understood what Hahn intended; (2) he had offered to show the account paid in full and issue a final lien waiver for $16,910.79 (Defendants' Exhibit 44; A, 77a); (3) Mrs. Hahn tendered $5,144.79 in full payment of the account and requested a final lien waiver (both Hoerstman and Hahn are talking the same language – full payment equals final lien waiver); (4) Mrs. Hahn stated: "If we send you a check for the $5144.79 we will consider this account closed and will not expect discussion of the other * items

. . ." i.e., the account will be considered paid in full; (5) the check tendered with Mrs. Hahn's letter had the words "final payment" written on it; (6) Mrs. Hahn said that if her conditional tender was not accepted then litigation was the alternative (Defendants' Exhibit 45; A, 80a-82a); (7) Hoerstman sought legal advice regarding the conditional tender and the legal effect of the condition; (8) he was advised by his attorney that it was not legal in Michigan to attach conditions to a check; (9) his attorney lined out the "final payment" language on the check and instructed Mr. Hoerstman to accept the check (Tr. Vol. II, p. 76; SA 188a).

This undisputed evidence shows Hoerstman understood the meaning of the conditions accompanying the tender. His initial attorney gave him bad advice regarding the legal effect of the conditions attached to Hahn's tender just like the bad advice given Mr. Shaw which led to the decision in Shaw v. United Motors Products Co., 239 Mich. 194, 214 N.W. 100 (1927). Acceptance of the conditional tender by Hoerstman after he admittedly knew that Hahn considered acceptance of it as closing the account with a final lien waiver due (i.e., account paid in full, settled, no more money would be paid) fulfilled the final element of the accord and satisfaction defense as a matter of law even though Hoerstman claimed additional money was due. ". . . The governing rule in this case is based upon the condition accompanying the tender and consequent acceptance of the condition in retaining the money. This required no previous agreement, but rests upon a dispute as to the amount due." Shaw, 239 Mich. at 196, 214 N.W. at 101 (emphasis

added)[4]; Fuller v. Integrated Metal Technology, Inc., 154 Mich. App. 601, 607, 397 N.W.2d 846 (1986) (accord and satisfaction may arise regardless of the lack of an agreement between the parties). Moreover, once Hoerstman understood the meaning of the conditions attached to the tender, there was a so-called "meeting of the minds" as discussed in some of the case law. The meeting of the minds does not mean the parties agreed to an amount due because if that was the law then the accord and satisfaction doctrine would not exist as the cornerstone is: ". . . a dispute as to the amount due". Shaw, 239 Mich. at 196, 214 N.W. at 101. Rather, once Hoerstman understood the meaning of the conditions attached to the Hahn tender, there was a "meeting of the minds". Deuches v. Grand Rapids Brass Co., 240 Mich. 266, 269, 215 N.W. 392, 394 (1927) (citing with approval Beck Electric Const. Co. v. Nat'l Contracting Co., 143 Minn. 190, 173 N.W. 413 (1919) in which the Court stated: "[t]he moment the creditor endorses and collects the check, knowing it was offered only upon condition, he thereby agrees to the condition and is estopped from denying such agreement. It is then that the minds of the parties meet and the contract of accord and satisfaction becomes complete." 143 Minn. at 192, 173 N.W. at 413); Gitre v. Kessler Products Co., Inc., 387 Mich. 619, 624, 198 N.W.2d 405, 408 (1972) (Court could not say as a matter of law whether the parties ". . . had a 'meeting of the minds' regarding the purported effect of the restrictive endorsements on the reverse side of the checks . . ." given that the checks were endorsed by only a rubberstamp).

---

[4] Hoerstman attempts to distinguish the facts in Shaw from those in this case because after Shaw accepted defendant's conditional tender he demanded more money and defendant requested that Shaw return the tender. However, as the case law shows, the accord and satisfaction doctrine is triggered once the plaintiff creditor accepts the conditional tender with knowledge of the defendant's conditions. There is no requirement that a defendant request that the plaintiff creditor return the tender.

As the cases cited by Hahn in their Main Brief show, certain conditional language will trigger the accord and satisfaction doctrine as a matter of law regardless of what the plaintiff creditor claims. See for example: DMI Design & Mfg., Inc. v. ADAC Plastics, Inc., 165 Mich. App. 205, 210, 418 N.W.2d 386, 388 (1987) (affirming summary disposition and noting plaintiff could not plausibly argue it did not know ramifications of defendant's conditional tender because it was clear as shown by plaintiffs' unilateral attempt to negate the condition by modifying defendant's offer of the accord); and cases set forth in Defendant-Appellants' Brief at pages 20-21.

C. Hahn's Conditional Tender Was In Full Settlement Of A Disputed Claim.

Breathing heavily as it stretches to cross the finish line, Hoerstman makes one last feeble lunge in an attempt to discredit the accord and satisfaction defense and ignores well-settled case law and the facts of the case to do so. Hoerstman finally claims that because Hahn did not dispute owing Hoerstman $5,144.79, the accord and satisfaction doctrine is not applicable (Hoerstman Brief pp. 25-27). That a debtor concedes a part of a claim is due does not defeat accord and satisfaction; such a claim is still unliquidated and payment of the conceded amount is consideration for settlement of the whole. Tanner v. Merrill, 108 Mich. 58, 65 N.W. 664 (1895). Accord: Lehaney v. New York Life Ins. Co., 307 Mich. 125, 131-132, 11 N.W.2d 830, 832 (1943) (where, as here, there is only one claim, the fact that part of the claim is conceded does not divide the claim; the whole claim is unliquidated citing Long v. Aetna Life Ins. Co., 259 Mich. 206, 242 N.W. 889 (1932)); Puffer v. State Mut. Rodded Fire Ins. Co., 259 Mich. 698, 244 N.W. 206

(1932) (noting that where a claim is disputed acceptance of the undisputed portion discharges the whole debt).

Hoerstman's reliance on Gitre v. Kessler Products Co., Inc., supra, and Del Serrone Contracting Corp. v. Avon Twp., 77 Mich. App. 82, 257 N.W.2d 667 (1977) is unavailing (Hoerstman Brief pp. 25-26). In Gitre, this Court held that payment of an existing undisputed claim does not, under the facts in that case, work an accord and satisfaction of other claims. In Gitre, the conditional tender, according to the check stub, was in payment of only the balance of January commissions and February commissions which were not disputed and thus the Court limited the accord and satisfaction defense to the plaintiff's commissions owing through the February 15, 1968, termination date but refused to extend the defense to all claims of the plaintiffs especially since plaintiffs endorsed the check by rubberstamp.

Del Serrone Contracting Corp. is another case involving endorsement of a tender by rubberstamp. The Court of Appeals reversed the Trial Court's accelerated judgment based on accord and satisfaction because the proofs were inadequate. The only understandable fact set forth in the Court of Appeals' Opinion consists of a description of the tender containing the restriction "final payment – Tinken Road Water Main Extension" and the rubberstamped endorsement of the plaintiff corporation. There are no facts set forth in the Opinion showing that the debt was disputed or if it was, the nature of the dispute and whether the plaintiff knew or should have known of the defendant's conditional tender. Then, *in dictum*, the Court, speaking generally, stated that payment of an undisputed claim does not work an accord and satisfaction. That is the law but it is

not relevant here because as shown earlier this case involves a disputed claim by Hoerstman for one job and a lesser amount claimed due by Hahn – the first thread needed to weave the accord and satisfaction defense.

CONCLUSION

The undisputed material facts show that Hahn in good faith disputed the balance owed Hoerstman. Those facts also show that Hoerstman understood the meaning of Hahns' conditional tender, namely if the tender was accepted the account would be paid in full and the final lien waiver would be issued. Hoerstman knew that the final lien waiver was given only after the account was paid in full. When Hoerstman deposited Hahns' conditional tender into the corporate checking account, there was an accord and satisfaction as a matter of law. Shaw v. United Motor Products is on point and controls this case.

The Opinion of the Court of Appeals as to the accord and satisfaction defense should be reversed. Hahns are entitled to an award for their costs.

Respectfully submitted,

Timothy W. Woods (P22861)
Jones Obenchain, LLP
600 KeyBank Building
202 South Michigan Street
Post Office Box 4577
South Bend, Indiana 46634-4577
Telephone: (574) 233-1194
Attorney for Defendants/Appellants
Juanita Rems Hahn and C. Ronald Hahn